(27,041)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 341.

GREAT WESTERN SERUM COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 6, 1919.

1 In the Court of Claims.

No. 33167.

GREAT WESTERN SERUM COMPANY, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

I. *Petition.*

(Filed December 3, 1915.)

Now comes the petitioner, Great Western Serum Company, and files this, its petition, against the United States of America, and respectfully alleges:

1. That it is, and during all the times mentioned in this petition has been, a corporation duly organized and existing under the laws of the State of Illinois, and having its principal office and place of business in the City of Chicago, in said State, and is and has been
2 engaged, among other things, in the business of manufacturing anti-hog cholera serum and virus and selling the same in the various States of the United States of America, and particularly in the States of Illinois, Iowa, Missouri, Indiana, Michigan and Wisconsin, and that in carrying on its said business it is, and has been during the times in this petition mentioned, engaged in commerce between the various States of the United States.

2. Petitioner further alleges that it has at all times borne *the* true faith and allegiance to the United States of America and to the Government thereof, and that it has not voluntarily aided, abetted or given encouragement to rebellion or to any act of disloyalty to the United States of America.

3. That on the 4th day of November, 1914, your petitioner had manufactured, owned and had in its possession in the City of Chicago and State of Illinois ready for sale 1,631,400 cubic centimeters of anti-hog cholera serum; in the City of Indianapolis, State of Indiana, 17,500 cubic centimeters; in the City of Jefferson, State of Iowa, 12,000 cubic centimeters, and in the City of East St. Louis, State of Illinois, 700 cubic centimeters. Petitioner further alleges that on or about said 4th day of November, 1914, it owned and had in its possession in the City of Chicago and State of Illinois 465 hyper-hogs which had properly been inoculated and treated so that there then was in said 465 hogs 1,467,800 cubic centimeters of serum blood, which had it not been for the acts of respondent, as hereinafter set forth, could and would have been shortly manufactured into anti-hog cholera serum, and which when so manufactured,

could and would have been sold in the various States of the
3 United States. Petitioner further alleges that on or about the 4th day of November, A. D. 1914, it owned and had in its possession in the City of Chicago, Illinois, 21,480 cubic centimeters of field virus for use in inoculating hogs and 9,000 cubic centimeters of hypering virus also for use in inoculating hogs. Petitioner further alleges that the said anti-hog cholera serum owned by it and in its possession in Chicago, Illinois; Indianapolis, Indiana; Jefferson, Iowa, and East St. Louis, Illinois, as aforesaid, was fairly and reasonably worth 1½c per cubic centimeter, or $24,924; that the serum blood in said 465 hogs owned by it and in its possession in the City of Chicago, Illinois, was fairly and reasonably worth 1c per cubic centimeter, or $14,688; that said 21,840 cubic centimeters of field virus owned and in the possession of the petitioner at Chicago, Illinois, was fairly and reasonably worth 1½c per cubic centimeter, or $327.60, and that said 9,000 cubic centimeters of hyper-virus owned by it and in its possession at Chicago, Illinois, was fairly and reasonably worth 1c per cubic centimeter, of $90 in all.

4. That prior to and on the said 14th day of November, 1914, there was prevalent in the City of Chicago and in its vicinity in the State of Illinois, and also in the States of Iowa and Indiana and in other States of the United States a disease or malady affecting cattle and hogs, known as the foot-and-mouth disease; that on said date it was discovered that said disease or malady was present and afflicted some of the hogs owned by petitioner, and in its plant in the City of Chicago; that the said hogs in the plant of the petitioner in the City of Chicago became afflicted with said disease or malady wholly without fault on the part of the petitioner.

5. Petitioner further alleges that the existence of the foot-
4 and-mouth disease in the localities mentioned, as aforesaid, was so serious as in the opinion of the Secretary of Agriculture (and as well actually) to threaten the livestock industry of the United States.

6. Petitioner further alleges that because of the prevalence of said disease or malady of foot-and-mouth disease in the State aforesaid, and particularly in the City of Chicago, and in the plant of petitioner, and because all the materials hereinbefore mentioned in the third paragraph of this petition had been contaminated by or exposed to said foot-and-mouth disease, duly authorized agent and officials of the Bureau of Animal Industry of the Department of Agriculture of the United States of America, and acting under the authority of the Secretary of Agriculture, and as well acting under and by virtue of the laws of the United States in such case made and provided, and in co-operation with the authorities of the State of Illinois, seized all of said anti-hog cholera serum in the possession of petitioner in the City of Chicago and kept the same in the possession of said Bureau of Animal Industry until it was thereafter destroyed as hereinafter set forth and seized and caused to be slaughtered and destroyed all of said 465 hogs in the possession of your petitioner at Chicago and wholly destroyed all of the serum blood in said 465 hogs, and also seized and destroyed said field virus and hypering virus; that

thereafter said agents and officials of said Bureau of Animal Industry in co-operation with the authorities of the respective States, and acting under the authority of the Secretary of Agriculture and the laws of the United States, seized said anti-hog cholera serum in the possession of petitioner at the Cities of Indianapolis, Indiana, Jefferson, Iowa, and East St. Louis, Illinois; that thereafter all of
5 said 1,631,400 cubic centimeters of anti-hog cholera serum which had been seized, as aforesaid, in the City of Chicago by the agents and officials of the Bureau of Animal Industry, was by said officers and agents in co-operation with the authorities of the State of Illinois, acting under the authority of the Secretary of Agriculture and under the statutes of the United States in such case made and provided, wholly destroyed; that all of the materials hereinbefore in this petition mentioned, have been confiscated and wholly destroyed by the said Bureau of Animal Industry, because of the existence of the foot-and-mouth disease, and in order to arrest and eradicate the same, and to protect the commerce in live stock between the several States of the United States, and all of said materials have been lost to the petitioner, as aforesaid.

7. The petitioner further alleges that during all the times mentioned in this petition and at all times during the period it has been engaged in business, as aforesaid, it has duly complied with, observed and obeyed all quarantine regulations of the Bureau of Animal Industry of the Department of Agriculture and all other bureaus and departments of the United States of America and all laws of the United States.

8. Petitioner further alleges that on the 4th day of March, 1915, there was approved by the President of the United States an act, heretofore duly passed by the Senate and the House of Representatives of the United States, sometimes called the Agricultural Appropriation Act, appropriating money for the Department of Agriculture *for* the United States for the fiscal year ending June 30, 1916; that, among other things, said act of the Congress of the United States, so ap-
proved, as aforesaid, provided as follows:
6 "In case of an emergency arising out of the existence of foot-and-mouth disease, rinderpest, contagious pleuro-pneumonia or other contagious or infectious disease of animals, which, in the opinion of the Secretary of Agriculture threatens the livestock industry of the country, he may expend in the City of Washington or elsewhere, out of any money in the Treasury not otherwise appropriated, the sum of $2,500,000, which sum is hereby appropriated, or so much thereof as he determines to be necessary, in the arrest and eradication of any such disease, including the payment of claims growing out of past and future purchases and destruction, in co-operation with the States, of animals affected by or exposed to, or of materials contaminated by or exposed to, any such disease, wherever found and irrespective of ownership, under like or substantially similar circumstances, when such owner has complied with all quarantine regulations, and said sum shall be immediately available for the purposes specified."

Petitioner further alleges that, in accordance with the laws of the

United States and especially of the said act of Congress, approved March 4, 1915, and the regulations of the Department of Agriculture, it duly filed with the Bureau of Animal Industry of the Department of Agriculture its claims for compensation on account of the property so destroyed as hereinbefore set forth by the Bureau of Animal Industry of said Department of Agriculture in co-operation with the duly constituted authorities of the States of Illinois, Indiana and Iowa, in the amount of one-half the value of said materials; that under the act of Congress hereinbefore mentioned, the said claims were wrongfully disallowed by the said Bureau of
7 Animal Industry of the Department of Agriculture; that thereafter an appeal from the decision of said Bureau of Animal Industry was taken to the Auditor of the State and other departments of the United States, and the said decision of the Bureau of Animal Industry was affirmed, and that thereafter an appeal was taken to the Comptroller of the Treasury Department of the United States, and that the decision of the Bureau of Animal Industry and of the Auditor of the State and other departments of the United States was affirmed and a certificate of no difference issued.

Petitioner further alleges that because of the facts hereinbefore set forth there is now justly due and owing to petitioner from the United States the sum of $40,029.60 and interest from November 4th, 1914, which said sum is made up as follows:

1,661,600 cubic centimeters anti-hog cholera serum destroyed	$24,924.00
1,467,800 cubic centimeters serum blood destroyed	14,688.00
21,840 cubic centimeters field virus destroyed	327.60
9,000 cubic centimeters hypering virus destroyed	90.00

Petitioner further alleges that no part of the said claim has been paid; that neither the same nor any part thereof has been sold, transferred or assigned; that there are no off-sets or counter-claims on the part of the United States.

Wherefore, petitioner respectfully asks for judgment against
8 the United States in the sum of $40,029.60, together with intrest thereon from the 4th day of November, 1914.

GREAT WESTERN SERUM CO., *Petitioner*,
By W. H. DARLINGTON, *Secretary*.

EDWIN H. CASSELS,
1145 *The Rookery, Chicago, Illinois*,
Attorney for Petitioner (Attorney of Record).
E. F. COLLADAY,
Of Counsel.

United States of America.

STATE OF ILLINOIS,
County of Cook, ss:

W. H. Darlington, being first duly sworn on oath, deposes and says that he is the secretary and the duly authorized agent in this behalf of

the Great Western Serum Company, the petitioner named in the foregoing petition, and that he makes this affidavit for said petitioner and in its behalf; that he has read the above and foregoing petition and knows the contents thereof and that the same are true.

W. H. DARLINGTON.

Subscribed and sworn to before me this 1st day of December, A. D. 1915.

[SEAL.] KENNETH B. HAWKINS,
Notary Public, Cook County, Illinois.

My commission expires October 4th, 1916.

9 II. *General Traverse.*

Court of Claims.

No. 33167.

GREAT WESTERN SERUM COMPANY

vs.

THE UNITED STATES.

No demurrer, plea, answer counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On October 29, 1918 this case was argued and submitted on merits by Mr. Edwin H. Cassels, for the claimant, and by Mr. Charles H. Bradley, for the defendants.

10 IV. *Findings of Fact and Conclusion of Law.*

Entered December 2, 1918.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff was, at the time mentioned in its petition, and now is, an Illinois concern, located in Chicago, Illinois, and engaged in the business of manufacturing and selling anti-hog-cholera serum and virus, in both State and interstate commerce.

II.

The plaintiff has at all times borne true faith and allegiance to the United States of America and has not voluntarily abetted or given encouragement to rebellion or to any act of disloyalty to the United States of America.

III.

The plaintiff has at all times duly observed and complied with the quarantine regulations and orders of the Bureau of Animal Industry of the United States Department of Agriculture.

IV.

Prior to and on November 4, 1914, there was prevalent in the city of Chicago and in its vicinty in the State of Illinois, and also in Michigan and Indiana and other States a disease or malady affecting cattle and hogs known as the foot-and-mouth disease, which in the opinion of the Secretary of Agriculture was so serious as to
11 threaten the live-stock industry of the United States. On said date of November 4, 1914, an agent of the Bureau of Animal Industry of the United States Department of Agriculture, having learned that said disease existed in the plaintiff's said serum plant in the city of Chicago, took possession of said plant and placed it under quarantine in order to arrest and eradicate said disease.

V.

At the time of said plant being so placed under quarantine there were on hand therein belonging to the plaintiff, 1,602,575 cubic centimeters of anti-hog-cholera serum, and 30,840 cubic centimeters of hog-cholera virus; and also 465 head of hypered hogs; that is, hogs which had been treated with hypered hog-cholera virus, and from which the resulting anti-hog-cholera serum blood had not yet been taken.

Said serum, virus, hogs, and serum blood were affected or contaminated by or exposed to the said foot-and-mouth disease found to exist in said plant.

VI.

Upon placing said plant under quarantine, said agent of the Bureau of Animal Industry seized the said serum, virus, and hogs, placed the serum and virus under United States Government seal, prohibited plaintiff's access to the plant, except that some of its employees were allowed in the plant to attend to the hogs and other property therein, and prohibited and prevented the plaintiff's operation of the plant and business.

The said hogs were killed and destroyed within a week or so after the quarantining of the plant by or under direction of said agent. The virus was kept under seal for several weeks, when, having lost

its potency through lapse of time, it was destroyed by said agent. The serum was kept under seal until on or about April 15, 1915, at which time it had become putrified and spoiled and was destroyed under joint agreement and direction of said agent and the assistant State veterinarian of Illinois because of danger of its spreading said foot-and-mouth disease by reason of its leakage into other parts of the plant, resulting from its putrefaction and breakage of the bottles in which it was contained.

VII.

On March 19, 1915, there were promulgated by the Secretary of Agriculture, to take effect on March 29, 1915, certain regulations "to govern the purchase and destruction of animals and materials," disinfection, and expenditures on account of the arrest and eradication of the foot-and-mouth disease and other contagious or infectious diseases of animals." Among these regulations were the following, which were in effect at the time of the destruction of the plaintiff's said serum by said agent of the Bureau of Animal Industry:

"If it appears to be necessary for the arrest and eradication of any disease of animals to purchase and destroy animals affected by, or exposed to, or any materials contaminated by, or exposed to, that disease, upon agreement of the authorities of a State to pay 50 per
12 cent of the expenses of (a) purchase, destruction, and disposition of animals and materials, and (b) the disinfection of infected premises, within the State, the chief of bureau is authorized to agree, on the part of the department, to pay 50 per cent of such expense.

"In cases where the laws of a State fix a maximum price which the State may pay for animals, an agreement by the State to pay, subject to the limitations imposed by the State laws, 50 per cent of the expenses of the purchase, destruction, and disposition of animals shall be accepted in lieu of the agreement to pay such expenses provided for by section 1 of this regulation (next above).

"Animals affected by or exposed to, and materials contaminated by or exposed to, disease will be appraised by a representative of the bureau and a representative of the State jointly, except that, if the owner and the State authorities approve, animals or materials may be appraised by a representative of the bureau alone.

"Dairy cattle shall be appraised at their dairy value. All other cattle and all sheep, swine, and goats shall be appraised at their meat value.

"Immediately after the completion of appraisals of any lot of animals, the owner thereof shall be informed of the amount of the appraisement. If the owner agrees to accept as compensation in full from the United States for such animals 50 per cent of the amount of the appraisement, or 50 per cent of such amount less 50 per cent of the net proceeds, if any be paid to him, from the disposition of the animals, his signature shall be secured to an agreement to that effect on forms furnished by the bureau. The agreement should be

attached to the voucher in which compensation is claimed for the animals. A copy of the agreement may be delivered to the owner at his request.

"Animals affected by, or exposed to, disease will be destroyed by the department only after obtaining the written agreement of the owner provided for in regulation 5 (next above). When such signed agreement has been obtained, all diseased animals shall be promptly killed and all exposed animals shall be promptly killed unless disposed of in accordance with regulation 9.

"Immediately after the conclusion of the appraisal of any materials the owner thereof shall be informed of the amount of the appraisement. If the owner agrees to accept 50 per cent of such amount as compensation in full from the United States for the materials, his signature shall be secured to an agreement to that effect on forms furnished by the bureau. The agreement should be attached to the voucher in which compensation is claimed for the materials. A copy of the agreement may be delivered to the owner at his request.

"Materials will be destroyed by the bureau employees only after obtaining the written agreement of the owner provided for in regulation 10 (next above).

"The department will not allow claims arising out of the destruction of animals or materials, unless they shall have been appraised, and the owners thereof shall have executed agreements, in compliance with these regulations.

"The department will not allow claims for amounts exceeding 50 per cent of the appraised value of animals killed or materials destroyed."

13 VIII.

The said virus and serum seized and destroyed by said agent of the Bureau of Animal Industry were not at any time appraised or purchased by the agents of said bureau or of the Department of Agriculture, nor was there at any time any agreement to purchase the same from the plaintiff.

IX.

The action of said agent of the Bureau of Animal Industry in the quarantining of said plant and the destruction of said hogs, virus, and serum was pursuant to instructions from said bureau to quarantine the plant and prohibit shipment of hogs, virus, and serum therefrom, and to "take every precaution to prevent the spread of this disease through the sale of virus or serum or the shipment of hogs from the establishment." There were no specific orders or directions from the bureau for the destruction of said virus or serum. The bureau was doubtful of its authority to purhcase and destroy said serum, and had so informed its said agent prior to the destruction of the same.

On October 30, 1915, an official statement in regard to a reappearance of said foot-and-mouth disease in northern Illinois in that year

was issued by the Department of Agriculture in which it was stated that all serum manufactured in Chicago which it was believed might contain possibilities of danger of transmitting the disease had been destroyed.

X.

The value of good uncontaminated field and hypering virus of the quantity seized and destroyed by said agent of the Bureau of Animal Industry was, at the time of said seizure and destruction, $417.60. It does not appear from the evidence whether the virus so seized and destroyed was contaminated by said foot-and-muoth disease, nor does it appear of what, if any, value it was at the time of its seizure. Said virus was of no value at the time of its destruction.

XI.

The value of anti-hog-cholera serum depends upon its purity and potency, which can be determined only by proper test. Of the 1,602,575 cubic centimeters of serum so seized and destroyed in the plaintiff's plant, only 71,350 cubic centimeters had been tested and found good prior to its seizure and destruction. The value of good, uncontaminated serum at the time of said seizure and destruction of plaintiff's serum was one and one-half cents per cubic centimeter.

It does not appear from the evidence what portion, if any, of said 1,602,575 cubic centimeters of serum was contaminated by said foot-and-mouth disease at the time of its seizure or destruction, nor does it appear of what value, if any, it was at the time of its seizure. It was of no value at the time of its destruction.

14 XII.

The value of good, uncontaminated serum blood of the quantity which, under ordinary or normal conditions, would have been obtained from the plaintiff's said 465 hypered hogs was, at the time of said seizure and destruction of said hogs, $13,091.00.

The portion of the blood of said hogs which was contaminated by said foot-and-mouth disease at the time of their seizure or destruction does not appear from the evidence, nor does the evidence show the value of the serum blood then in said hogs.

The plaintiff has received no compensation for the serum blood in said hogs, as such, but was paid the sum of $8,740.41 by the Department of Agriculture and the State of Illinois, jointly, in equal proportion, under provisions of the laws of the United States and of said State, as the meat value of the hogs. Said payment was made upon appraisement of the hogs and written agreement by the plaintiff to accept such payment as in full from the United States on account of the destruction of said hogs.

XIII.

In January, 1915, the plaintiff filed in the Bureau of Animal Industry of the Department of Agriculture a claim for 50 per cent of the alleged value of the said virus, serum, and serum blood for which recovery is sought in this suit. The claim was rejected by said bureau and also by the Secretary of Agriculture.

XIV.

All of said property of the plaintiff seized, held, and destroyed as in these findings of fact above set forth, in the arrest and eradication of said foot-and-mouth disease, was seized and destroyed by the agents of the United States in cooperation with the authorities of the State of Illinois.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the petition herein be and the same is hereby dismissed. Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the chief clerk and collected by him according to law.

15 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Second day of December, A. D., 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge and decree that the Great Western Serum Company, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the defendants, the United States; and, that the petition be and it hereby is dismissed: And it is further ordered adjudged and decreed that the defendants, the United States, shall have and recover of and from the claimant, the Great Western Serum Company, the sum of Two Hundred and Eighteen Dollars and eighty-four cents ($218.84), the cost of printing the record in said cause in this court, to be collected by the Clerk, as provided by law.

By The COURT.

VI. *Proceedings Had After Entry of Judgment.*

On January 28, 1919, the claimant filed a motion for modification of the findings of fact, conclusion of law, and motion for a new trial, which motion was overruled by the Court February 24, 1919.

VII. *Claimant's Application for and Allowance of an Appeal.*

Claimant hereby prays an appeal to the United States Supreme Court from a judgment of this court rendered on the 24th day of February 1919, reaffirming a judgment rendered on the 2nd day of December 1918, by which the claimant's petition was dismissed and judgment was rendered in favor of the United States for the sum of $218.84, the cost of printing the record in said cause, in the Court of Claims.

EDWIN H. CASSELS,
Attorney for Claimant.

Filed March 18, 1919.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

March 18, 1919.

16 Court of Claims.

No. 33167.

GREAT WESTERN SERUM COMPANY

vs.

THE UNITED STATES.

I, Saml. A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law; of the judgment of the court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this March 18, 1919.

[Seal Court of Claims.]

SAML. A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 27,041. Court of Claims. Term No. 955. Great Western Serum Company, appellant, vs. The United States. Filed March 31st, 1919. File No. 27,041.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920

GREAT WESTERN SERUM COMPANY,
Appellant,

vs.

THE UNITED STATES,
Appellee.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims, denying to appellant recovery of its claim of $40,029.60, the value of anti-hog cholera, serum, virus and serum blood, seized and destroyed by the United States in its campaign for the eradication of the food and mouth disease. The Court of Claims made fourteen (14) findings of fact and, based on these findings, the case may be stated concisely as follows:

Appellant, an Illinois corporation, was engaged during the years 1914 and 1915 in the manufacture and sale of anti-hog cholera serum. Its plant was

located at Chicago and its sales were made in both intrastate and interstate commerce. (Trans. 5, Finding I.) It had at all times borne true faith and allegiance to the United States, had not voluntarily abetted or given encouragement to any rebellion or act of disloyalty and had duly observed and complied with all the quarantine orders and regulations of the Bureau of Animal Industry, and of the United States Department of Agriculture. (Trans. 6, Findings II and III.)

Prior to and on November 4, 1914, there was prevalent in the City of Chicago and in the State of Illinois and in Michigan, Indiana and other states a disease affecting cattle and hogs known as the foot and mouth disease, and the situation was so serious as in the opinion of the Secretary of Agriculture to threaten the live stock industry of the United States. On the 4th day of November, 1914, the Bureau of Animal Industry of the Department of Agriculture, having discovered that the foot and mouth disease existed in appellant's plant in Chicago took possession of the plant and placed it under quarantine in order to arrest and eradicate the disease. (Trans. 6, Finding IV.) On the day the Bureau of Animal Industry took possession of appellant's plant, appellant had on hand 1,602,575 cubic centimeters of anti-hog cholera serum, of which 71,350 had been tested and found to be pure and potent. The value of this serum uncontaminated was 1½ cents per cubic centimeter or $24,038.62. (Trans. 6 and 9, Findings V and XI.) Appellant also had on hand 30,840 cubic centimeters of anti-

cholera virus, the value of which (if uncontaminated) was $417.16. (Trans. 6 and 9, Findings V and X.) Appellant also had on hand at that time 465 hypered (treated with anti-cholera virus) hogs, from which the serum blood had not been taken. Apart from the meat value of the hogs, the value of the serum blood in the 465 hypered hogs (if uncontaminated) and obtained under ordinary or normal conditions was $13,091.00. (Trans. 6 and 9, Findings V and XII.)

All of this property was seized by the Bureau of Animal Industry but only the hogs were appraised and by written agreement appellant accepted for the hogs $8,740.41 paid in equal proportions jointly by the United States through the Department of Agriculture and the State of Illinois. (Trans. 9, Finding XII.) This sum represented the sound meat value of the hogs. No appraisement was had and no payment was made for the serum, for the virus or for the serum blood. (Trans. 8, Finding VIII.) The hogs were killed and destroyed within a week after their seizure and the virus was destroyed a few weeks later. The serum was kept under Government seal until about April 15, 1915, at which time it having become spoiled, it was destroyed by joint agreement and direction of the agent of the Bureau of Animal Industry and the Assistant State Veterinarian of Illinois because of danger of its causing the foot and mouth disease. (Trans. 6 and 7, Finding VI.)

On March 19, 1915, there was promulgated by the Secretary of Agriculture to take effect on March 29,

1915, certain regulations "to govern the purchase and destruction of animals and materials" disinfection and expenditures on account of the arrest and eradication of foot and mouth disease. These regulations were in effect at the time of the destruction of appellant's serum by the agent of the Bureau of Animal Industry. Among them was a regulation providing for a payment of 50 per cent of the expenses of purchase, destruction and disposition of animals and materials, and the disinfection of affected premises upon agreement of the authorities of a state to pay the other 50 per cent; a regulation providing that animals and materials affected by, exposed to or contaminated by the disease should be appraised by a representative of the Bureau of Animal Industry and of the state jointly or with the approval of the state authorities, by a representative of the Bureau of Animal Industry only; a regulation that swine should be appraised at their meat value; a regulation providing that upon the completion of an appraisal the owner should be paid 50 per cent of the amount thereof, his signature having first been secured to an agreement to accept that amount from the United States; a regulation providing for the destruction of animals exposed to the disease, and also for the destruction of materials exposed to or contaminated by the disease, and a regulation that no claims would be allowed unless an appraisal had been made. (Trans. 7 and 8, Finding VII.)

The action of the agent of the Bureau of Animal Industry in quarantining the plant of appellant, in destroying its hogs, virus and serum was pursuant

to instructions from the bureau to quarantine the plant and prevent shipments of hogs, virus and serum therefrom and to "take every precaution to prevent the spread of the disease through the sale of virus or serum or the shipment of hogs from the establishment." (Trans. 8, Finding IX.) For the destruction of the virus and serum there were no specific orders except the instructions above stated. Later on, however, on October 30, 1915, an official statement was made by the Department of Agriculture in which it was there stated that all serum manufactured in Chicago which was believed might contain possibilities of danger of transmitting foot and mouth disease had been destroyed. (Trans. 8 and 9, Finding IX.)

The evidence did not show whether all or a part of the virus, serum and serum blood, so seized and destroyed, was contaminated by the foot and mouth disease at the time of its seizure or destruction, but the court found that it was seized and destroyed pursuant to instructions hereinbefore mentioned and because it was believed that it might contain possibilities of danger in transmitting the disease, and there is a separate finding that it was "seized, held and destroyed * * * in the arrest and eradication of said foot and mouth disease * * * by the agents of the United States in co-operation with the authorities of the State of Illinois." (Trans. 10, Finding XIV.)

In January, 1915, appellant filed its claim with the Bureau of Animal Industry of the Department of Agriculture for 50 per cent of the value of the virus,

serum and serum blood. The claim was rejected by the bureau and by the Secretary of Agriculture.

On these findings of fact the court decided as a conclusion of law that the petition of the appellant should be dismissed and judgment rendered against appellant and in favor of the United States for the cost of printing the record in the case. Accordingly on December 2, 1918, judgment was entered against appellant, dismissing its petition and decreeing that it should pay to the United States $218.84 costs. The Court of Claims filed no opinion in the case. Thereafter a motion for new trial was made and denied and appellant prayed an appeal to this court which was allowed on March 18, 1918.

Questions Involved.

In view of the findings of fact of the Court of Claims the only questions involved in this appeal are:

First. Did the Act of March 4, 1915, create an obligation on the part of the United States to pay for appellant's materials seized and destroyed?

Second. Is appellant barred from a recovery because no appraisement of the property was made by the United States before its destruction and because no written agreement on forms provided by the Bureau of Animal Industry was made as to its value?

Third. In the absence of such appraisement and agreement, as provided by the regulations of the Bureau of Animal Industry, do the facts show as a matter of law that there was an implied contract to purchase and pay for appellant's property?

Fourth. In the event appellant is held to be entitled to recover, shall the amount be based on the sound value of the property seized and destroyed?

SPECIFICATIONS OF ERRORS RELIED UPON.

(1) The finding of the Court of Claims that there was no agreement to purchase the property of the appellant is erroneous. As a conclusion of law the court should have found that the Act of Congress of March 4, 1915, created an obligation to pay for appellant's materials and that the facts showed an implied contract to purchase and to pay for such materials.

(2) The conclusion of law of the Court of Claims is erroneous in that it finds that the petition of appellant for the allowance of its claim should be dismissed.

(3) The judgment of the Court of Claims is erroneous in that it adjudged and decreed that appellant was not entitled to recover any sum in this action of and from the United States and in fact it adjudged that appellant should pay to the United States the cost of printing the record.

BRIEF OF THE ARGUMENT.

At the time appellant's property was seized by the United States the only money available for payment of claims of this character was that appropriated by the Appropriation Act for the fiscal year ending June 30, 1915, 38 Stat. L., pages 418, 419. Among other things this Act appropriated money for the following purposes:

> "For carrying out the provisions of the Act approved May 29, 1884, establishing the Bureau of Animal Industry * * * and the provisions of the Act approved February 24, 1903, to enable the Secretary of Agriculture to more efficiently suppress and prevent the spread of contagious and infectious diseases of live stock, and for other purposes; and also the provisions of the Act approved March 3, 1905, to enable the Secretary of Agriculture to establish and maintain quarantine districts * * * and for carrying out the provisions of the Act approved March 4, 1913, regulating the preparation, sale, barter, exchange or shipment of any virus, serum * * * intended for use in the treatment of domestic animals * * * to purchase in the open market samples of all tuberculin, serums, anti-toxins, or analogous products * * * to test the same * * * to purchase and destroy diseased or exposed animals or quarantine the same * * *."

After the seizure and destruction of appellant's hogs and virus, and after the seizure, but before the destruction of the serum for which the claim is made, Congress passed two Acts making appropriations for the purpose of eradicating foot and mouth disease. The first was

the Act approved January 25, 1915, and provided as follows:

> "For the arrest and eradication of the foot and mouth disease, the payment of claims arising out of past and future purchases and destruction of animals affected by or exposed to the foot and mouth disease, and for a deficiency in the objects specified under the head 'General Expenses, Bureau of Animal Industry,' in the Agricultural Appropriation Act for the fiscal year nineteen hundred and fifteen $2,500,000, to be expended by the Secretary of Agriculture."
>
> 38 Stat. L., 797.

The second was the Act of March 4, 1915, and provided as follows:

> "In case of an emergency arising out of the existence of foot and mouth disease, rinderpest, contagious pleuropneumonia or other contagious or infectious disease of animals, which in the opinion of the Secretary of Agriculture threatens the live stock industry of the country, he may expend in the City of Washington or elsewhere, out of any money in the treasury not otherwise appropriated, the sum of $2,500,000, which sum is hereby appropriated, or so much thereof as he determines to be necessary in the arrest and eradication of any such disease, *including the payment of claims growing out of past and future purchases and destruction, in cooperation with the States, of animals affected by or exposed to, or of materials contaminated by or exposed to, any such disease,* wherever found and irrespective of ownership, under like or substantially similar circumstances, when such owner has complied with all quarantine regulations, and said sum shall be immediately avail-

able for the purposes specified." 38 Stat. L. 1115.

(Italtics here and elsewhere are ours.)

It was under these provisions of the statutes that the Department of Agriculture made its large disbursements for hogs, cattle, forage, lumber, virus, serum and many other infected or exposed materials for the most seized and destroyed in the late autumn and early winter of 1914, and finally succeeded in stamping out the foot and mouth disease.

Because of the fact that the Court of Claims filed no opinion in the case it is not clear whether the court reached its conclusion of law simply because of the fact that there had been no appraisement or written agreement to purchase, or because it had concluded that the facts were not sufficient to show an implied agreement to pay for appellant's property. Apparently, however, the court based its conclusion largely, if not wholly, on the ground that there had been no appraisal and no agreement to purchase appellant's property before its destruction; and that point we shall take up first in our argument.

POINT I.

Construction of the Acts of Congress.

The Act of March 4, 1915, was designed to provide for claims like the claim of appellant and it, in itself, creates an obligation on the part of the United States to pay for the materials destroyed.

The Act of January 25, 1915, appropriated money to cover claims "arising out of *past and future purchases and destruction of animals* affected by or exposed to the foot and mouth disease." The Act of March 4, 1915, appropriated money to pay "claims growing out of *past and future purchases and destruction* in co-operation with the states, *of animals affected by or exposed to or materials* contaminated or exposed to" the foot and mouth disease.

It is evident that the latter act was designed to place *materials* on precisely the same basis as *animals* with respect to the right of the owner to receive compensation. It is also evident that the purpose of the latter act was to correct an oversight in the former act in omitting to include materials and to remove any possible ground of discrimination between owners whose animals and materials had been destroyed in the past, and those whose animals and materials might be destroyed in the future.

Moreover not only materials purchased but materials *destroyed* were to be paid for. There could not have been any express purchase of materials before the Act of March 4th. Under the Act of January 25th, animals destroyed prior thereto were to be

paid for. Under the Act of March 4th, materials destroyed prior thereto were to be paid for, notwithstanding the fact that, prior to the passage of the acts, there could not have been an express purchase by the United States. Materials destroyed before March 4th were therefore by the express terms of the act to be paid for provided only they were destroyed in co-operation with the states in the arrest and eradication of the disease.

Appellant's hogs, virus and serum blood were destroyed prior to the passage of the Act of January 25th. Its serum was also seized prior to January 25th but was destroyed after the Act of March 4th. Compensation was made for the hogs. We submit that it was the intent of Congress clearly to provide compensation for the materials so that obvious injustice might be avoided.

Reasonably interpreted the Act of March 4th does not require that there should be any express agreement to *purchase* in order to give to the owner of materials a right to compensation, nor could it, we submit, require an implied agreement to purchase—destruction only under the conditions provided by the act (and which were found by the Court of Claims to exist as a matter of fact in the case at bar) alone being sufficient. But even if the act might be construed to mean that purchase was necessary, it could not be that an express agreement was required because such an agreement manifestly was unauthorized before the passage of the act. If any agreement to purchase was contemplated it must have been an implied agreement—implied from the subsequent authority given in the act, and being in fact a ratification and adoption of past seizures and destruction.

POINT II.

The fact that there was no appraisal and written agreement as provided by the regulations of the Bureau of Animal Industry does not affect the validity of appellant's claim or in any way operate to defeat its right to recover.

The regulations of the Bureau of Animal Industry provided that animals and materials should be "appraised by a representative of the bureau and a representative of the state jointly, except that, if the owner and the state authorities approve, animals or materials may be appraised by a representative of the bureau alone." (Trans. 7, Finding VII.) The court found that there was an appraisement of the hogs and an agreement to accept payment (Trans. 9, Finding XII), but that the "virus and serum seized and destroyed by said agent of the Bureau of Animal Industry were not at any time appraised or purchased by the agents of said bureau or of the Department of Agriculture, nor was there at any time any agreement to purchase the same from the plaintiff." (Trans. 8, Finding VIII.)

The regulations of the Bureau of Animal Industry also provided that immediately after the completion of appraisals the owner of the property should be notified of the amount of the appraisement and his signature secured to an agreement to accept from the United States fifty per cent of the amount of the appraisement, *"on forms furnished by the bureau."*

Clearly, therefore, the duty to make an appraise-

ment and to present an agreement to the owner was one, by its own regulations, imposed upon the Bureau of Animal Industry. The owner of the property seized was utterly helpless. He had nothing to do with the appraisal or in the preparation of any agreement because the agreement itself must be on a form furnished by the bureau. Appellant's hogs were appraised and paid for, so also were its forage and lumber. The question therefore is a very simple one. If appellant's serum and virus had been appraised and an agreement signed as in the case of the hogs appellant would have been entitled to payment. Is the situation with respect to the hogs so different from that with respect to the other property that appellant was entitled to pay for one and not for the other?

It is submitted that it is contrary to all logic and reason that the owner of property seized by the United States in the serious emergency provided for by an Act of Congress is to be denied payment, solely because the agents of the United States have failed to comply with regulations promulgated by the United States for the guidance of these same agents. In the case at bar it appears that an appraisement was made of the hogs, but that the representatives of the bureau failed to make the appraisement and present to the owner an agreement for the purchase of the virus and serum, the result being (if the position of the United States is tenable) that the owner who acquiesced in the acts of the agents of the Bureau of Animal Industry in the performance of their plain duty under the emergency then existing is to suffer

the entire loss of his property, because these agents did not comply with their own regulations. It is submitted that such a conclusion violates, not only the principles of law which have been laid down by this court, but it also violates the elementary principles of justice and fair dealing. What possible reason, outside of the extremely technical one found in finding No. VIII, can be offered to justify the United States in paying for the plaintiff's hogs, and at the same time refusing to pay for the plaintiff's virus and serum, when all of the property was seized in the arrest and eradication of the foot and mouth disease because of the emergency then existing, which, in the opinion of the Secretary of Agriculture, was so serious as to threaten the live stock industry of the United States? (Trans. 10, Finding XIV.)

It is submitted that the law, as clearly established by this court, is that, even where formal preliminaries to the taking of property are prescribed by statute, and the United States, disregarding the statute and not taking the steps preliminary to the acquirement of the property, nevertheless seizes it and uses it or destroys it, it is still liable, in precisely the same way and to the same extent as if the preliminary steps had been taken as provided by the statute. Here, however, no preliminary steps were provided by the *statute* to the taking of the property. Such steps as were provided were laid down, not in any statute, but merely in the *administrative regulations* of a Government department. This clearly adds an additional reason for the application of the principle to the case at bar.

The Supreme Court has passed directly on this question in *Campbell* v. *U. S.*, 107 U. S., 407, a case, we submit, precisely in point. This was a suit originally brought in the Court of Claims to recover a drawback on account of large amounts of linseed cake made by the claimant out of linseed imported from a foreign country made into cake in the United States and afterwards exported to London. The case was dismissed in the Court of Claims on the ground of no jurisdiction but only after a hearing and findings of fact. The findings showed the amount of linseed imported and of the manufactured products exported. Findings also were to the effect that the collector of the port acting under instructions of the Secretary of the Treasury refused or neglected to carry out the regulations relating to drawbacks other than merely to receive the entry of the exported goods. *The claimant therefore was without any certificate for the payment of drawbacks as required by the regulations and by the terms of the regulations was not entitled to his drawbacks until he had such a certificate.* On pages 410 and 411 the court said:

> *"The argument of counsel for the United States and the opinion of the Court of Claims is, that, until the officers of the customs comply with all the regulations of the Secretary of the Treasury, and the collector issues the drawback certificate, the law imposes upon the United States no obligation to pay anything for such drawback.* That the law conferred upon the Secretary the right to make the regulations and the collector the power to make the certificate for payment of drawback, and that the refusal of the collector to perform the duties imposed upon him preliminary to making his certificate, and then refusing

the certificate, totally defeats the claim of the party, who, by the law, is guarantied a right to his drawback, and who has complied with all that the law requires of him to secure and enforce it.

It would be a curious thing to hold that Congress, after clearly defining the right of the importer to receive drawback upon subsequent exportation of the imported article on which he had paid duty, had empowered the secretary by regulations, which might be proper to secure the government against fraud, to defeat totally the right which Congress had granted. If the regulations of themselves worked such a result, no court would hesitate to hold them invalid as being altogether unreasonable.

But the regulations in this case are not unreasonable. Nor do they interpose any obstacle to the full assertion and adjustment of the plaintiff's right. It is the order of the Secretary of the Treasury forbidding the collector to proceed under these regulations or in any other mode, which is the real obstacle. Is that order a defense to this action? Can the Secretary by this order, do what he could not do by regulations, repeal or annul the law? Can he thus defeat the law he was appointed to execute, by making regulations and then, by ordering his officers not to act at all, place himself above the law and defy it?

We think the Court of Claims has jurisdiction of such a claim. 1. Because it is founded on a law of congress; and 2. *Because the facts found in this case raise an implied contract that the United States will refund to the importer the amount he paid to the government.*"

It was accordingly held that the facts found by the Court of Claims clearly established the right of the claimant to recover the amount of the drawback

claimed. In other words this court held precisely what we are asking in this case: that a failure on the part of the agents of the Government to follow their own regulations does not defeat an otherwise valid claim.

Another case also in point is *U. S.* v. *Flanders*, 112 U. S., 88.

In this case the Collector of Internal Revenue for the First District of Louisiana had paid out certain sums of money for publishing advertisements. The amount had never been formally allowed, nor had it ever been certified under the regulations by the proper accounting officers of the Treasury Department. Suit was brought against the collector to recover certain monies which he had collected, and the question presented was whether or not the items of expenditure which had not been allowed or certified as provided by the regulations should be credited to him as a set-off. The court held that notwithstanding the failure to issue such certificate or to have the items formally allowed, the collector was entitled to such set-off and in its opinion it said, page 92:

> "But we are of opinion, that, as statute required the advertisements to be made, the collector was entitled to a credit for the reasonable and proper amounts paid therefor, although such amounts were not formally allowed or certified."

We cite also *United States* v. *Swiggett*, 84 Fed., 97. In this case Swiggett, who was register of the United States Land Office for the Helena land district of Montana, brought suit to recover $699 expended by him for the necessary rent of the land office. This money had been paid out of his own funds without

any formal or other request on the part of the United States or any express contract relating thereto. The Circuit Court of Appeals affirmed a judgment for the claimant. In the course of its opinion it said, page 104:

> "It appears from the findings that the land office for the district of Helena, Mont., was established by law; that an office at that place was required for the transaction of the business pertaining to the office; that it was also necessary as a place for the keeping of the books, records, papers, and files belonging to the office; and that the amount paid for the rent was reasonable and proper for that purpose. In view of these facts, and the general character of the appropriations for the contingent expenses of the several land offices, and the lack of authority on the part of the secretary of the interior to withhold an allowance for the rent of the land office at Helena, *the court is of opinion that an implied contract did exist, on the part of the government, to reimburse the register the amount expended by him for that purpose.* The judgment is affirmed."

See also

United States v. *Reed*, 61 Fed., 414.

In that case it was held that the United States Shipping Commissioner at the port of New York was entitled to recover expenses and disbursements made by him including the sum paid for rent of offices where the statute which rendered such expenditures a necessary incident to his office did not expressly or by clear implication provide that such expenditures should be paid by the incumbent of the office out of his salary. Such disbursements the court said are

"a proper charge against the United States." This case was affirmed in *U. S.* v. *Reed,* 167 U. S., 664.

A phase of this question was considered also in *Crozier* v. *Krupp,* 244 U. S., 290.

This was a suit in equity to enjoin the use of certain patents relating to improvements in guns and gun carriages. It was held that the owner of the patents was not entitled to an injunction, but that he was entitled to sue in the Court of Claims for compensation for the use of the patents. The court in discussing the question as to whether or not the fact that compensation had not been fixed prior to the taking and use of the patents by the United States, defeated the claim of the owner for compensation, said, page 306:

> "*Indisputably the duty to make compensation does not inflexibly, in the absence of constitutional provisions requiring it, exact, first, that compensation should be made previous to the taking,—that is to say, that the amount should be ascertained and paid in advance of the appropriation*—it being sufficient, having relation to the nature and character of the property taken, that adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation; second, that, again, always having reference to the nature and character of the property taken, its value and the surrounding circumstances, the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of the Government of the duty to make prompt payment of the ascertained compensation,—that is, by the pledge, either expressly, or by *necessary implication,* of the public good faith to that end."

Not only has it been established beyond question that a claimant with a just claim may recover, notwithstanding the fact that regulations of an executive department have not been complied with, *but it is also just as well established that even when certain preliminaries to the maturing of a claim are provided by statute instead of merely by regulations the claimant does not lose his claim simply because preliminary statutory formalities have not been complied with, if the United States has actually taken his property.*

This point is well illustrated in the case of *U. S.* v. *Great Falls Manufacturing Co.*, 112 U. S., 645. In this case the facts were that Congress had appropriated money to be spent under the direction of the President for the purpose of bringing water into the City of Washington, and in the act it was provided

> "that if the plan adopted by the President should require water to be drawn from any source within the limits of Maryland, the assent of the Legislature of that State should first be obtained."

Subsequently the Legislature of Maryland passed an act giving assent to the purchase by the United States of the necessary lands for the construction of the necessary works and providing that if an agreement could not be made with the owners of the land or materials,

> "It shall nevertheless be lawful for the United States to enter upon such lands and to take and use such materials after having *first made payment or tendered payment for the same at the valuation assessed thereon, in the manner prescribed in that act.*"

In other words it was distinctly provided by statute that property could only be taken only after the assessment of the valuation in the manner provided by law and payment or the tender of payment of such valuation. Without following any part of the method laid down by the statute, that is to say: without trying to reach any agreement, without having any valuation made, and without tendering payment the Government took possession of plaintiff's land. The claimant sued for its value in the Court of Claims and recovered, and the judgment of that court was affirmed by the Supreme Court.

It was argued in that case as in this that the failure to take the necessary preliminary steps provided by the statutes of the United States, and of the State of Maryland precluded the owner from recovery. The court said page 656:

> "The making of the improvements necessarily involved the taking of the property, and *if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work to have the agents of the Government enjoined * * * there is no sound reason why the claimant might not waive that right,* and electing to regard the action of the Government as a taking under its sovereign right of eminent domain, demand just compensation."

The court further said (p. 658):

> *"In such a case it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an Act of Congress is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose.* If the claim-

ant makes no objection to the particular mode in which the property has been taken, but substantially waives it, by asserting, as is done in the petition in this case, that the Government took the property for the public uses designated, we do not perceive that the court is under any duty to make the objection in order to relieve the United States from the obligation to make just compensation."

The claimant in this case had a right to the appraisement and contract. The regulations were for him quite as much as for the Government. He has been compelled to waive the appraisement and the written contract. At best he has done only what the claimant did in *U. S.* v. *Great Falls Manufacturing Co.* But such waiver cannot here—as it did not there—affect the right to recover the reasonable value of the property taken. The regulations as to appraisement and contract were solely for the purpose of fixing the value; and the Court of Claims with the evidence at hand could do that quite as well as the agents of the Bureau of Animal Industry. In fact it has done so in its findings.

The opinion in the Great Falls Manufacturing Co. case was cited and followed in *U. S.* v. *Lynah,* 188 U. S., 445, In this case Lynah sued for compensation for the destruction of a valuable rice plantation which had been turned into a valueless and irreclaimable bog as the necessary result of improvement in navigation of the Savannah River. There had been no attempt to value or come to an agreement for the purchase of the property, nor had there been any condemnation proceedings, but it was held that the owner was entitled to recover, and the court said, page 467:

> "This brings the case directly within the scope of the decision in *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, where as here there was no direction to take the particular property, but a direction to do that which resulted in a taking, and it was held that the owner might waive the right to insist on condemnation proceedings, and sue to recover the value."

We cite also *U. S.* v. *Buffalo Pitts Co.*, 193 Fed., 905. This was an action in the Circuit Court of the United States sitting as a Court of Claims under the Tucker Act to recover compensation for the use of an engine which had been seized and used by the United States in the construction of a dam in New Mexico, and which after the completion of the project had been turned over to the claimant. The Reclamation Act under which the dam was being built provided that whenever it was necessary to acquire any rights or property the Secretary of the Interior might purchase or secure the same by condemnation. In this case claimant's engine was in the hands of a construction company, the claimant holding title under a mortgage and entitled to possession because the construction company had failed to pay a note for the purchase price when it became due. The construction company defaulted and the Government simply took the engine without any agreement as to the compensation to be paid, and without any proceedings of any other kind to acquire title or the right to possession. The claimant demanded the engine and the Government refused and used the engine until the dam was completed. When the engine was abandoned it apparently was argued that there

having been no agreement to purchase or to use, and no legal proceedings to acquire possession or title, the claimant could not recover. The Court of Appeals said, page 906:

> "There was no need for formal proceedings in condemnation, and the rights of the plaintiff were not prejudiced by the omission of the Government to take them." Citing *U. S.* v. *Lynah*, 188 U. S., 445.

The judgment of the Circuit Court in favor of plaintiff was affirmed by the Court of Appeals on the ground that the right which the Government had under the Reclamation Act to take and use the plaintiff's property was *"subject to the duty of paying for the use and from this duty a promise to pay is to be implied as in U. S.* v. *Great Falls Mfg. Co., supra."*

POINT III.

The findings of the Court of Claims establish an implied contract on the part of the United States to purchase and pay for appellant's property.

The findings of fact, we submit, have settled in favor of appellant all the prerequisites to a recovery on an implied contract, if, indeed it is necessary in view of the express terms of the Act of March 4, 1915, to imply a contract to purchase at all. It is established by the findings that appellant had obeyed all quarantine regulations and orders (Trans. 6, Finding III); that the foot and mouth disease was, at the time of the seizure of appellant's property, prevalent and so serious as in the opinion of the Secretary of Agriculture to "threaten the live stock industry of the United States" (Trans. 6, Finding IV); that the appellant's plant was quarantined and its property seized and destroyed "by the agents of the United States" in co-operation with the state authorities "in the arrest and eradication of foot and mouth disease." (Trans. 6, 7, 10, Findings VI, XIV.) Such seizure and destruction must therefore have been under the authority of and in compliance with the acts of Congress. In the face of such findings it becomes, of course, immaterial that there were no specific orders to destroy appellant's virus and serum, because the Department of Agriculture in its official statement of October 30, 1915, in fact adopted and ratified the act of its agents in destroying the appellant's serum. (Trans. 8, Finding IX.) That the Bureau of Animal

Industry did the only thing it could do under the orders actually received is clear from Finding IX itself. That any mode of procedure which did not go as far as the agents of the bureau did go would have been unwise and positively unsafe, is obvious.

The United States must, therefore, justify the acts of its agents under the acts of Congress. It may be argued that the destruction of appellant's property was under the police power, but a sufficient and conclusive answer is that the destruction of property in a state not actually or constructively in transit from one state to another is not within the police power of the United States, and, further; that Congress had expressly provided for just compensation for property taken in the work of eradicating the foot and mouth disease and appropriated money to pay that compensation.

The findings, having found every material fact in favor of the validity of appellant's claim save only that there was no appraisal made by the bureau and no written agreement to purchase, must it not follow as a conclusion of law that there was an implied contract to purchase?

That the United States may become liable under implied contracts (as individuals may become liable) needs no argument. In fact the Court of Claims was expressly given jurisdiction to hear claims against the United States founded on "any contract express or implied." That the United States is not absolved from paying a just claim because its agents have failed to follow their own rules which merely govern *matters of administrative procedure,* having no bearing on the validity or justice of the claim, we

have, we submit, shown conclusively. Will a contract to pay be implied in the absence of the express contract provided for in the regulations?

In *Ogden* v. *Saunders*, 12 Wheat., 213, Chief Justice Marshall said (p. 341):

> "A great mass of human transactions depend upon implied contracts; upon contracts which are not written but grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations which as honest, fair, and just men they ought to have made."

In the cases where the question of implied contract has arisen, this court has applied the principle to the Government as well as to individuals, and has determined the liability of each with the same regard to justice and reason.

In *United States* v. *Russell*, 13 Wall., 623, three steamboats had been seized and used by the United States without any agreement fixing the compensation. Certain payments for the use of the steamboats were made by the Government to the owner, but the owner claimed a larger sum, and, the demand being refused, he instituted suit in the Court of Claims. It appeared that the boat had been used by the owner for carrying private freight, and that during the Civil War, in obedience to the military order of an assistant quartermaster of the army, the owner had turned over his boat for public service. The court said that the emergency was such that it justified the officers in ordering the steamboats into the service of the United States, and, that being true, the United States was bound to make full compensation to the

owner for the use of the boats. The court said (pp. 630):

> *"Tested by those rules it is quite clear that the obligation in this case to reimburse the owner of the steamboats was of a character to raise an implied promise on the part of the United States to pay a reasonable compensation for the service rendered,* and if so, then it follows that the decree was properly made in favor of the plaintiff, unless it appears that the adjustment of the claim belonged to Congress or to the executive department, and not to the Court of Claims."

The court further said (p. 632), after reviewing the findings:

> "On the contrary, the court is of the opinion that the findings of the court of claims show that the employment and use of the steamboats were such as raise an *implied* promise on the part of the United States to reimburse the owner for the services rendered and the expenses incurred, as allowed by the court of claims."

The question of when a contract will be implied came up again in *Salomon* v. *U. S.,* 19 Wall., 17.

This was an appeal from the judgment of the Court of Claims disallowing a claim for corn delivered by the claimant to a quartermaster of the army at Fort Fillmore. There was some question as to whether the corn in question amounting to around 12,000 bushels was delivered under a verbal extension of a formal written contract, or was a new and separate transaction. The court held that however considered, and notwithstanding the fact that the statutes required all contracts for military supplies to be in writing the claimant was entitled to recover,

and the judgment of the Court of Claims was reversed. The court said (pp. 19-20):

> "Whether we regard this last delivery, made in October, as under a verbal extension of the time stipulated in the original contract, or consider it as a new transaction in which the Government received and took possession of the corn, and used part of it and permitted the remainder of it to be injured in its hands, we think the claimant is equally entitled to pay for it.
>
> That Act of 1862, 1 Stat. at L., 411, requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of such matter, accepting delivery of such supplies after the day stipulated, nor is a verbal agreement to extend the time of performance invalid.
>
> And if this were not so, when the quartermaster in charge receives of a person, corn for the Government, gives a receipt and voucher for the amount and the price, and the Government uses such part of it as it wants, and suffers the remainder to decay by exposure and neglect, *there is an implied contract to pay the value of such corn*, which value may, in the absence of other testimony, be presumed to be the price fixed in the voucher by the quartermaster."

In *United States* v. *Palmer*, 128 U. S., 262, it appeared that the Court of Claims rendered judgment against the United States on an implied contract for compensation to the owner for the use of a patented invention. Palmer was the inventor of certain improvements in infantry equipment, for which letters patent had been granted by the United States. After the granting of the patent, the general of the army recommended their adoption to the Secretary of War, and, thereafter, they were adopted and used

by the Government, with the consent of Palmer, but without any agreement whatsoever as to the compensation which he was to receive. In fact, as the court said, all that could be inferred from the evidence was that there was an "expectation" on the part of Palmer that he would receive reasonable compensation. The court held that Palmer was entitled to recover as on an implied contract on the part of the United States to pay him a reasonable sum for the use of his invention. The court in its opinion, in discussing the legal basis of Palmer's claim, said (p. 269):

> "This assumption of the appellant is erroneous. No tort was committed or claimed to have been committed. The Government used the claimant's improvements with his consent; and, certainly, with the expectation on his part of receiving a reasonable compensation for the license. This is not a claim for an infringement, but a claim of compensation for an authorized use—two things totally distinct in the law, as distinct as trespass on lands is from use and occupation under a lease. The first sentence in the original opinion of the court below strikes the keynote of the argument on this point. It is as follows: 'The claimant in this case invited the Government to adopt his patented infantry equipments, and the Government did so. It is conceded on both sides that there was no infringement of the claimant's patent, and that whatever the Government did was done with the consent of the patentee and under his implied license.' *We think that an implied contract for compensation fairly arose under the license to use, and the actual use, little or much, that ensued thereon.* The objection, therefore, that this is an action for a tort falls to the ground."

In *United States* v. *Great Falls Mfg. Co.*, 112 U. S., 645, the court again discussed at some length the principle underlying the liability of the United States under implied contracts. The facts in this case have been stated in our argument of Point II. The court said (pp. 656-657):

> "Beyond doubt, the land and the water rights and privileges in question have been for nearly twenty years held and used by officers and agents of the Government, without any compensation whatever having been made therefor to the claimant. By what authority have they appropriated to public use the property of the claimant? The answer to this question will determine whether the present demand of the claimant arises out of an *implied* contract and, therefore, enforcible by suit against the United States in the Court of Claims. * * *
>
> In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an Act of Congress, taken the property of the claimant for public use, is under an obligation, imposed by the Constitution, to make compensation. *The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken pursuant to an Act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims, of actions founded upon any contract, express or implied, with the Government of the United States.*"

In *United States* v. *Lynah*, 188 U. S., 445 *supra*, the court, following *United States* v. *Great Falls Mfg.*

Co., supra, held that Lynah was entitled to recover on an implied contract, and said (p. 474):

> "Therefore, following the settled law of this court, we hold that there has been a taking of the lands for public uses, and that *the government is under an implied contract to make just compensation therefor.*"

The principle laid down in the opinion in the Lynah case was reaffirmed in the opinion in *Tempel* v. *United States,* 248 U. S., 121, in which the court said at p. 131:

> "The case at bar is entirely unlike both the *Lynah* and the Cress case. In neither of those cases does it appear that, at the time of the taking, there was any claim by the government of a right to invade the property in question without the payment of compensation. Under such circumstances, it must be assumed that the government intended to take and to make compensation for any property taken so as to afford the basis for an *implied promise. And when the implied promise to pay has once arisen, a later denial by the government (whether at the time of suit or otherwise) of its liability to make compensation does not destroy the right in contract and convert the act into a tort.*"

In *United States* v. *Berdan Firearms Mfg. Co.,* 156 U. S., 552, the Berdan Company obtained a judgment against the United States for $95,004.26, as compensation for the use of a patent for an improvement in breech-loading firearms. The facts were that the United States had adopted and used the Berdan patent with the consent of the owner of the patent, but without any agreement as to the amount of compensation. In fact, it appeared that the officers in

charge did not believe that they had authority to agree upon compensation. One of the findings was to the effect that the attitude of the War Department towards inventors in ordinance had been one of "neutrality"; that it had neither admitted nor denied the legal rights of inventors, but proceeded upon the policy that the executive officers should not decide upon such claims against the Government, or upon conflicting claims, but that such claims should be presented without pejudice to some other tribunal. The court affirmed the judgment of the Court of Claims, and held claimant was entitled to recover as upon an implied contract, and that the United States should pay the reasonable value of the use of the invention. The court said (p. 569):

> "The import of these findings is this: That the officers of the government, charged specially with the duty of superintending the manufacture of muskets, regarded Berdan as the inventor of this extractor ejector; that the difference between the spiral and flat spring was an immaterial difference; that, therefore, they were using in the Springfield musket Berdan's invention; that they used it with his permission as well as that of his assignee, the petitioner, and that they used it with the understanding that the government would pay for such use as for other private property which it might take, and this, although they did not believe themselves to have the authority to agree upon the price.
>
> These facts bring the case clearly within *United States* v. *Palmer*, 128 U. S. 262 and show that the judgment of the Court of Claims was not founded upon a tort resulting from a mere infringement, but upon a contract to which both

> parties assented. That no price was agreed upon, or that the officers of the government were not authorized to agree upon a price, is immaterial. No price was fixed in *United States* v. *Palmer, supra,* or in *United States* v. *Russell,* 80 U. S. 13 Wall. 623. The question is whether there was a contract for the use, and not whether all the conditions of the use were provided for in such contract. This is the ordinary rule in respect to the purchase of property or labor."

This case was followed in *Crozier* v. *Krupp,* 244 U. S., 290, where the court said that it was not necessary, in the absence of constitutional provision, that compensation should be made previous to the taking of property, it being sufficient that there were adequate means for a prompt ascertainment and payment of compensation, and that:

> "The duty to provide for the payment of compensation may be adequately fulfilled by an assumption on the part of the government of the duty to make prompt payment of the ascertained compensation,—that is, by the pledge, either expressly or *by necessary implication,* of the public good faith to that end."

The principle of law applicable to the case at bar was stated admirably in *Cramp & Sons S. & E. B. Co.* v. *Intnl. Curtis M. T. Co.,* 246 U. S., 28.

The court was considering the question of the liability of a contractor doing work for the United States for the infringement of a patent. In the course of his opinion the chief justice discusses the law relating to property in letters patent, and the relation of the United States to the patentee, and he stated certain principles as being "undispuably es-

tablished" by the authorities, among which was the following, page 40:

> "(c) That despite the want of authority to implead the United States, yet where an officer of the United States, within the scope of an official authority vested in him to deal with a particular subject, having knowledge of existing patent rights and of their validity, appropriated them for the benefit of the United States by the consent of the owner express or implied upon the conception that compensation would thereafter be provided, the owner of the patent right, taken under such circumstances might, under the statute law of the United States permitting suits against the United States on contracts, express or implied, *recover by way of implied contract* the compensation which might be rightly exacted because of such taking."

That it makes no difference as to the right of a claimant to recover that his contract was not formally signed or his bond formally approved, is held in

U. S. v. *Purcell Envelope Co.*, 249 U. S., 313, 319.

We cite also:

U. S. v. *Buffalo Pitts Co.*, 193 Fed., 905.

O'Reilly De Camara v. *Brooke*, 135 Fed., 384.

Mason v. *U. S.*, 14 Ct. Cl., 59.

Hersch v. *U. S.*, 15 Ct. Cl., 385.

Hills v. *U. S.*, 19 Ct. Cl., 79.

Merriam v. *U. S.*, 29 Ct. Cl., 250.

Gresham v. *King*, 14 Can. Exch., 236.

The Question of Value.

The Court of Claims found that the values of the serum, virus and serum blood were as alleged in the petition. (Trans. 9, Findings X, XI and XII.) These values, however, were based on the theory that the property was merchantable and uncontaminated. These findings also set out that the virus and the serum was of no value at the time of their destruction. Findings XI states that only a portion of the serum had been tested. It may be argued that because the serum was not tested and because the virus and serum were of no value at the time of their destruction that even if the appellant is entitled to recover the amount should be merely nominal.

As to the testing: It is respectfully submitted that the United States cannot take advantage of that fact for the reason that (as the findings show) it had been rendered impossible to make a test of the untested serum by the agents of the Bureau of Animal Industry who seized and destroyed all the hogs including the test hogs in appellant's plant. Not only that but Finding XI finds that so much of the serum as had been tested was "found good prior to its seizure and destruction." So far as the serum is concerned therefore the presumption must be that it was good merchantable serum; and all the proof offered and Finding XI support this contention. If the United States were to refuse the claim because of the fact that some of the serum would not stand the test, then the burden was upon it to show that fact. Appellant has shown that 1,602,575 cubic centimeters of its

serum was seized and destroyed of which, prior to such seizure, 71,351 cubic centimeters had been tested and *all* found good. The rest of the test was rendered impossible by the United States who are estopped clearly from asking abatement of or deduction from the claim because of the possibility that some of the rest of the serum might not have stood the test. The only possible evidence—evidence as to the result of the tests prior to seizure—showed that all the serum presumptively was good. If it was not good, it was only because it had been contaminated by or exposed to the foot and mouth disease.

The virus was seized and held by the Bureau of Animal Industry until it was no longer potent and then destroyed. The serum was seized and held by the Bureau of Animal Industry until it had spoiled and it was then destroyed. It is obvious from an examination of the Acts of Congress to which we have referred and the regulations of the Department, that contaminated animals and materials were to be appraised on their sound value. As a matter of fact they had no other value and to make an appraisement of contaminated animals or materials at their contaminated value would be idle if not absurd. Appellant's hogs were paid for at their meat value on the theory that the meat was salable and it was paid $8,740.41 for these hogs although as a matter of fact most of them having been afflicted with and the others exposed to the foot and mouth disease, they had no meat or other merchantable value whatever.

It is unnecessary to discuss this question of value at length. We merely call the court's attention to the matter of value in anticipation of the argument which may be made by the appellee. We submit that

the Court of Claims should have allowed the appellant's claim and entered judgment in its favor for the amount found by it to be the sound value of the property seized.

We have shown:

(1) That the Act of March 4, 1915, creates a direct obligation to pay for appellant's materials.

(2) That failure on the part of the United States to appraise the property for which claim is made, and to secure on their own form a written contract of purchase signed by the appellant cannot defeat appellant's claim.

(3) That an implied contract to purchase and pay to the appellant the reasonable value of the materials seized and destroyed in the arrest and eradication of the foot and mouth disease is clearly established by the findings of fact made by the Court of Claims.

(4) That the appellant is entitled to recover for the materials seized and destroyed, the amount of their sound value at the time of their seizure as found by the Court of Claims without taking into consideration the fact that they were contaminated by, or exposed to foot and mouth disease.

For the foregoing reasons the appellant submits that the judgment of the Court of Claims should be reversed and the case remanded with directions to enter a judgment in favor of appellant and against the United States for $37,547.22 and for costs.

Respectfully submitted,

Edwin Haass

Attorney for Appellant.

JAMES H. WILKERSON,
EDWARD F. COLLADAY,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

GREAT WESTERN SERUM COMPANY, appellant,
v.
THE UNITED STATES.
No. 90.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from the judgment dismissing the petition. The issues were raised by a general traverse to the petition. (Rec. 5.)

The appellant demanded judgment for the sum of $40,029.60 on account of the seizure and destruction by agents of the United States of anti-hog cholera serm and hog cholera virus manufactured by appellant, and of alleged serum blood in a herd of hogs in its plant. (Rec. 1–4.)

The facts as disclosed by the findings made by the court below are as follows:

The appellant was an Illinois concern having a plant in the city of Chicago, where it manufac-

tured for sale in both State and interstate commerce antihog-cholera serum and virus. (Rec. 5.)

On March 4, 1914, there was prevalent in the city of Chicago and its vicinity in the State of Illinois, and also in Michigan, Indiana, and other States a disease affecting cattle and hogs known as the foot-and-mouth disease. On this date an agent of the Bureau of Animal Industry of the United States Department of Agriculture, having learned that said disease existed at appellant's plant, took possession of the plant and placed it under quarantine in order to arrest and eradicate the disease. (Finding IV, Rec., p. 6.)

When the plant was placed under quarantine the appellant had on hand 1,602,575 cubic centimeters of anti-hog cholera serum and 30,840 cubic centimeters of hog-cholera virus, and also 463 head of hypered hogs—that is, hogs which had been treated with virus and serum for the purpose of producing from their blood anti-hog cholera serum. The said serum, virus, hogs, and serum blood were affected or contaminated by or exposed to the said foot-and-mouth disease found to exist at the plant. (Finding V, Rec., p. 6.)

Upon placing said plant under quarantine said agent of the Bureau of Animal Industry seized the said serum, virus, and hogs, placed the serum and virus under United States Government seal, prohibited appellant from having access to the plant, except that some of its employees were allowed in the plant to attend to the hogs and

other property therein, and prohibited and prevented the plaintiff's operation of the plant and business.

The said hogs were killed and destroyed within a week or so after the quarantining of the plant by or under direction of said agent. The virus was kept under seal for several weeks, when, having lost its potency through lapse of time, it was destroyed by said agent. The serum was kept under seal until on or about April 15, 1915, at which time it had become putrified and spoiled and was destroyed under joint agreement and direction of said agent and the assistant State veterinarian of Illinois because of danger of its spreading said foot-and-mouth disease by reason of its leakage into other parts of the plant, resulting from its putrefaction and breakage of the bottles in which it was contained.

The said virus and serum seized and destroyed by said agent of the Bureau of Animal Industry were not at any time appraised or purchased by the agents of said bureau or of the Department of Agriculture, nor was there at any time any agreement to purchase the same from the appellant.

The action of said agent of the Bureau of Animal Industry in the quarantining of said plant and the destruction of said hogs, virus, and serum was pursuant to instructions from said bureau to quarantine the plant and prohibit shipment of hogs, virus, and serum therefrom, and to "take

every precaution to prevent the spread of this disease through the sale of virus and serum or the shipment of hogs from the establishment." There were no specific orders or directions from the bureau for the destruction of said virus or serum. The bureau was doubtful of its authority to purchase and destroy said serum, and had so informed its said agent prior to the destruction of the same. (Finding IX, Rec., p. 8.)

The said serum and virus were of no value at the time of their destruction. What, if any, value they had at the time of their seizure did not appear from the evidence. (Finding X, Rec., p. 9.)

The value of antihog cholera serum depends upon its purity and potency, which can only be determined by proper test. Of the 1,902,575 cubic centimeters of serum so seized and destroyed only 71,350 cubic centimeters had been tested and found good prior to its seizure and destruction. (Finding XI, Rec., p. 9.)

The portion or amount of the blood in said hypered hogs which was contaminated by said foot-and-mouth disease at the time of the seizure and destruction of the hogs was not disclosed by the evidence, nor did the evidence show the value of the alleged serum blood in the hogs. (Finding XII, Rec., p. 9.) The appellant received no compensation for the serum blood in said hogs, as such, but was paid the sum of $8,740.41 by the United States Department of Agriculture and the State of

Illinois jointly, in equal proportions, under provisions of the laws of the United States and of said State, as the meat value of the hogs, said payment having been made upon the appraisement of the hogs and the written agreement by the appellant to accept such payment in full from the United States on account of the destruction of said hogs. (Finding XII, Rec., p. 9.)

In January, 1915, the appellant filed in the Bureau of Animal Industry in the Department of Agriculture a claim for 50 per cent of the alleged value of the said serum, virus, and serum blood for which recovery is sought in this suit. Said claim was rejected by said bureau and by the Secretary of Agriculture. (Finding XIII, Rec., p. 10.)

All the property of the appellant so seized, held, and destroyed in the arrest and eradication of said foot-and-mouth disease was seized and destroyed by the agents of the United States in cooperation with the authorities of the State of Illinois. (Finding XIV, Rec., p. 10.)

BRIEF.

ARGUMENT.

I.

No right exists in appellant to demand compensation for materials destroyed.

1. There was no authority for the seizure and destruction of appellant's materials by the agents of the United States.

At the time of the seizure of the materials and at the time of the destruction of the virus and serum blood alleged to be in the herd of hogs there was no statute authorizing their purchase, seizure, or destruction, or making appropriation for the payment of claims growing out of the purchase and destruction of any such materials. Appellant's materials were in the State of Illinois and were not subjects of interstate commerce. The statutes which had been enacted from time to time authorizing the Secretary of Agriculture to take steps for the prevention of the spread and for the suppression of diseases among animals gave him authority only to take action affecting animals or materials contaminated or affected by disease when such animals or materials had become subjects of interstate or foreign commerce.

The act of March 4, 1915, which is discussed more fully under a subsequent heading (No. II, post, p. 10), was enacted several months after the seizure and destruction of the virus and serum

blood and about a month before the destruction of the serum. This statute did not furnish authority for the destruction of the serum or ratify the acts of the Government agents in seizing and destroying the other materials.

2. There being no authority for the action of its agents no contract can be implied upon the part of the United States to compensate appellant for the materials destroyed.

The language which this court used in the case of *Gibbons* v. *United States,* 8 Wall., 269, 274, would seem very aptly to apply to the case at bar when in the case cited it was said:

> But it is not to be disguised that this case is an attempt, upon the assumption of an implied contract, to make the Government responsible for the unauthorized acts of its officer, those acts being in themselves torts.

To raise an implied contract the acts of the agents of the Government complained of must have been authorized by law. *Stansbury* v. *United States,* 8 Wall., 33; *Hume* v. *United States,* 132 U. S., 406; *United States* v. *Barlow,* 132 U. S., 271.

In *Whiteside* v. *United States,* 93 U. S., 247, 257, this court said:

> Torts committed by an officer in the service of the United States do not render the Government liable in an implied *assumpsit,* even though the acts done were apparently for the public benefit.

In *Hill* v. *United States*, 149 U. S., 593, 598, it was said:

> Nor can the settled distinction in this respect between contract and tort be evaded by framing the claim as upon an implied contract.

3. If the agents of the United States were authorized in their action in destroying appellant's materials the latter would still not be entitled to compensation.

If the materials were not contaminated by disease, there is no possible statutory authority for their purchase, destruction, or for the payment of the claim. Appellant relies upon the act of March 4, 1915, which merely authorizes the Secretary of Agriculture in the exercise of his discretion to pay claims growing out of the purchase and destruction of materials *contaminated by disease*.

The destruction of appellant's materials, if contaminated by disease, would not be the taking of private property for public use under the right of eminent domain, but would rather be similar to the exercise of police power by the States in destroying that which would be detrimental to the public. Property is taken under eminent domain because it is useful to the public and is destroyed under the police power because it is harmful, or as Mr. Justice Bradley expressed it in *Davidson* v. *New Orleans*, 96 U. S., 97:

> Where the property itself is the cause of the public detriment.

"From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation while the latter on principle does not." *Freund Police Power,* sec. 511.

It has been generally held as a rule, as expressed in *Mugler* v. *Kansas,* 123 U. S., 623, 669, that—

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, morals, or the safety of the public is not—and, consistently with the existence and safety of organized society, can not be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner. See also *Bowditch* v. *Boston,* 101 U. S., 16; *Reduction Co.* v. *Sanitary Works,* 199 U. S., 306; *Chicago, B. & Q. Ry. Co.* v. *Drainage Comr.,* 200 U. S., 561; *Hamilton,*

collector, v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S., 146; *Jacob Ruppert* v. *Caffey*, 251 U. S., 264.

While in most of the States where there are statutes authorizing the abatement of nuisances and destruction of diseased cattle statutory provision has also been made for compensation to the property owners, there is abundant authority supporting statutes where no provision is made for compensation. The following cases upheld the validity of State statutes permitting the destruction of diseased domestic animals without compensation to the owner. *Newark & S. O. Horse Car Co.* v. *Hunt*, 50 N. J. L., 308; 12 Atl., 697. *Houston* v. *State*, 98 Wis., 481; 74 N. W., 111. *New Orleans* v. *Charouleau*, 121 La., 890; 45 So., 911.

II.

The act of March 4, 1915 (38 Stat., ch. 144, pp. 1086, 1115), does not entitle appellant to the relief demanded.

1. This statute left the disbursement of the money thereby appropriated to the discretion of the Secretary of Agriculture, and his action in rejecting plaintiff's claim is not subject to review.

The language used in the statute makes it perfectly clear that it was the intention of Congress that the Secretary of Agriculture should be authorized, in the exercise of his discretion, to expend so much of the money appropriated as he deemed best and when he deemed best in the

arrest and eradication of the diseases specified, and also that he might, if he saw fit, pay claims growing out of past and future purchases and destruction of animals and materials. The Secretary exercised the discretion reposed in him by the act in rejecting plaintiff's claim and, there being neither an allegation in the petition nor proof that there was any abuse by him in the exercise of this discretion, his action is not reviewable.

In *Decatur* v. *Paulding,* 14 Pet., 497, at page 515, this court said:

> The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion, or judgment.

See also *Martin* v. *Mott,* 12 Wheat., 19; *United States ex rel. Dunlap* v. *Black,* 128 U. S., 40; *Boynton* v. *Blaine,* 139 U. S., 306; *Redfield* v. *Windom,* 137 U. S., 636; *Keim* v. *United States,* 177 U. S., 290; *Bates and Guild* v. *Payne,* 194 U. S., 106; *Louisiana* v. *McAdoo,* 234 U. S., 627, and cases therein cited; *Johnston et al.* v. *United States,* 37 C. Cls., 309; *Griffith* v. *United States,* 22 C. Cls., 165; *Shipman* v. *Live Stock Commission,* 115 Mich., 488; *Campbell* v. *City of Manchester,* 67 N. H., 148.

The payment of the claims and the amounts to be paid were left to the discretion of the Secretary of Agriculture. Congress clearly did not intend

that the Federal Government should pay the entire amount of such claims as should be paid. The statute provides that the claims might be paid when there had been cooperation with the States; that is, that the Federal Government might share with the States the expense of eradicating the diseases when the Secretary, in the exercise of his discretion, decided to do so. The proviso to the section of the statute in question refers to a specified herd of cattle and provides that the Secretary of Agriculture shall not pay more than 50 per cent of the claim, which was to be restricted to the meat value of the cattle. This proviso further indicates that the Secretary of Agriculture should not pay the whole amount of the claim even in those cases which he decided should be paid.

This statute did not create a *right* to compensation for destruction of materials. In so far as the appropriation was made available to the Secretary of Agriculture for the purchase of materials or the payment of claims, it was a mere voluntary contribution which the Secretary could use in his discretion for the purposes specified. It was to enable the Federal Department of Agriculture to cooperate with the States in suppressing the diseases specified in the act, and make it possible in thus cooperating to destroy materials by first acquiring possession of them by purchase. The

statute specifically provides that the money appropriated was to be used by the Secretary of Agriculture in the payment of claims growing out of past and future *purchases* and destruction of materials.

2. This statute limited the disbursements which could be made by the Secretary of Agriculture in the payment of claims to those claimants whose property had been purchased by the United States before it was destroyed.

At the time the property was seized this statute had not been enacted. It was clearly the intention of Congress, as expressed in this act, that the Secretary of Agriculture was authorized only to pay claims for the destruction of animals and materials when there had been a previous purchase by the Government of the property destroyed. This was the interpretation of the statute by the Secretary of Agriculture, as is indicated by the regulations prescribed by him for its administration. These regulations provided that no materials should be destroyed until they had been appraised and the owner of the property had signed a written agreement to accept a certain price. They further provided that no claims for animals or materials destroyed would be paid unless the property had been appraised and the owners thereof had executed agreements in compliance with the regulations for its purchase by the Government. (Rec., pp. 7, 8.) These regulations had the force of law. *United States* v. *Eaton*, 144 U. S., 677.

It is a fact that there was neither an appraisal nor purchase of the materials nor any agreement to purchase. (Rec., p. 8.)

It must be presumed that Congress and the Secretary of Agriculture, respectively, in enacting and promulgating the act and regulations referred to, had clearly in mind the constitutional limitation upon the Federal power in matters coming within the police power of the several States. It was not contemplated or intended by the act or the regulations that agents of the Federal Government should have the power to go into the States, seize and destroy the property of their citizens, which had not become the subject of interstate commerce, unless such agents should first acquire possession by purchase from the owners.

In *Reid* v. *Colorado* (187 U. S., 137, 148), in referring to the animal-industry act of May 29, 1884 (23 Stat., 31), this court said:

> Congress did not intend to override the power of the States to care for the safety of the property of their peoples by such legislation as they deemed appropriate. It did not undertake to invest any officer or agent of the department with authority to go into a State and without its assent take charge of the work of suppressing or extirpating contagious, infectious, or communicable diseases there prevailing and which endangered the health of domestic animals. Nor did Congress give the department authority by its officers or agents to inspect cattle within the limits of a State

> and give a certificate that should be of superior authority in that or other States, or which should entitle the owner to carry his cattle into or through another State without reference to the reasonable and valid regulations which the latter State may have adopted for the protection of its own domestic animals.

There having been no purchase nor agreement to purchase the materials in question, the Secretary of Agriculture was not authorized to pay appellant's claim.

VALUE OF MATERIALS DESTROYED.

The lower court has found that the materials destroyed were of no value at the time of their destruction, and that whether they had any value at the time of their seizure had not been established by the evidence. If, therefore, it were held as a matter of law that appellant was entitled to be compensated for the destruction of its property it could not recover, because it failed to prove that its materials were of any value.

APPELLANT'S CLAIM FOR SERUM BLOOD IN HERD OF HOGS.

The findings of fact covering this part of appellant's demand would appear to be a sufficient answer to it.

The court below found that the appellant had "received no compensation for the serum blood in said hogs, as such, but was paid the sum of $8,740.41 by the Department of Agriculture and the State of Illinois jointly, in equal proportion,

under provisions of the laws of the United States and of said State, as the meat value of the hogs. "Said payment was made upon appraisement of the hogs and written agreement by the plaintiff to accept such payment as in full from the United States on account of the destruction of said hogs." (Finding XII, Rec. 9.)

The court further found that "the portion of the blood of said hogs which was contaminated by said foot-and-mouth disease at the time of their seizure or destruction does not appear from the evidence, nor does the evidence show the value of the serum blood then in said hogs." (Finding XII, Rec. 9.)

If, in the first place, appellant had been entitled to compensation for the serum blood in the hogs, in accepting payment in full for the hogs compensation for the serum blood was included in that payment. Even if this conclusion is incorrect, appellant would still not be entitled to compensation, as it failed to prove the value of the said serum blood.

CONCLUSION.

For the reasons assigned it is respectfully submitted that the judgment of the court below was right and should be affirmed.

FRANK DAVIS, JR.,
Assistant Attorney General.
CHARLES H. BRADLEY,
Special Assistant to the Attorney General.

NOVEMBER, 1920.

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IN THE

Supreme Court of the United States

October Term, 1920

GREAT WESTERN SERUM COMPANY,
Appellant,

vs.

THE UNITED STATES,
Appellee.

REPLY BRIEF FOR APPELLANT

I.

It is argued for the United States that the seizure of appellant's property was without authority and hence in the nature of a tort by the representatives of the Bureau of Animal Industry, and the seizure being thus unauthorized, compensation can not be recovered.

In answer to this it may be said that the Bureau

at the time of the seizure had ample authority to quarantine and to purchase and destroy diseased animals (Appellant's Brief, 8). Whatever authority was wanting at the time of seizure was amply supplied by the Act of March 4, 1915, which was in effect before the destruction of the serum. If any such action was needed, the Act of March 4, 1915, was in fact a ratification and adoption of past seizures and destruction because it distinctly authorized and appropriated money for the payment of claims "growing out of *past and future* purchases and destruction" of animals and materials.

Moreover, the Bureau of Animal Industry had exercised the full extent of its authority in directing its representatives in Chicago to "*take every precaution* to prevent the spread of this disease through the sale of virus or serum or the shipment of hogs from the establishment." And whatever may have been the status of the acts of the Bureau and its agents on November 4, 1914, and subsequently, these acts were fully adopted by the Bureau and as well ratified by its official statement of October 30, 1915, in which the Bureau reviewed its acts in destroying all serum potentially dangerous in Northern Illinois (Rec. 8-9). The only rational explanation of the inclusion in the Act of March 4, 1915, of the provision for payment for past and future destruction of materials is that it was to cover precisely such cases as this and correct an obvious injustice, by placing the owners

of destroyed materials on the same footing as the owners of destroyed animals.

It is further argued that the destruction of appellant's property was in the exercise of the police power of the United States and hence there can be no compensation even if the seizure and destruction were authorized. The answer to this point is found on page 14 and as well on page 6 of the brief for the United States, where it is said that "appellant's materials were in the State of Illinois and were not subjects of interstate commerce." The United States could not under the police power seize and destroy property in a State not in transit in interstate commerce. It was just this situation that the Acts of January 25, 1915, and of March 4, 1915, were designed to meet. It was the purpose of the Act to give to the Secretary authority to do something which he could not do before—to seize and destroy, and pay for animals and materials which might cause the spread of the foot and mouth disease. The United States needed the cooperation of the States to save the live stock industry, and it is clear that the obligation to pay created by the Act was the inducement and consideration for such cooperation.

What we have here to consider is not a question of the exercise by the United States of the police power at all, but the question of the extent of the contractual obligation express or implied of the United States.

II.

1. It is argued that the Statute (Act of March 4, 1915) gave to the Secretary of Agriculture discretion arbitrarily to reject appellant's claim—a discretion not subject to review.

The answer to this argument is that the discretion given to the Secretary of Agriculture was discretion to determine what animals and materials were to be seized and destroyed in order to arrest and eradicate the foot and mouth disease. Having once exercised this discretion and determined upon the seizure and destruction of property for the purpose authorized, his discretion ended and he had no right or authority to discriminate between owners as to payment; nor had he any right or authority to discriminate between different kinds of property taken and destroyed in the arrest and eradication of foot and mouth disease by purchasing and paying for one kind of property or the property of a particular owner and refusing to pay for another kind of property or the property of some other owner.

In this case whatever discretion the Secretary of Agriculture had was in fact ended when, as the Court of Claims has found, "in the arrest and eradication of said foot and mouth disease," (Rec. 10) appellant's serum and virus "were seized and destroyed by the agents of the United States in cooperation with the authorities of the State of Illinois." (Rec. 10.)

It cannot be that the Secretary of Agriculture

might exercise his discretion to take property and then after having taken the property again exercise discretion as to whether it should be paid for or not. In the first instance, of course, it was for him to decide as to what property should be taken and destroyed in the arrest and eradication of the disease. Having decided this point and taken the property, his discretion was at an end.

Appellant is not asking this Court to review the propriety of the act of the Secretary of Agriculture in taking and destroying its property. It is asking merely a review of legal liability of the United States growing out of such taking and destruction.

2. It is argued that appellant's claim must fail because its property had not been purchased before its destruction. True an appraisal was not made by a representative of the Bureau of Animal Industry and by the State jointly or by a representative of the Bureau alone, as the regulations provided. But the failure and refusal to make the appraisal was wholly the fault of the United States. And likewise the failure to present to appellant an agreement to purchase on its own forms was the fault of the United States. The regulations did not provide for the contingency of a failure or refusal by the representatives of the Bureau of Animal Industry to appraise seized property. What could then be done? Obviously, what actually was done. The appellant made its own appraisal and presented its claim to the Department. Its appraisal (the value per cubic centi-

meter) has been found to be correct by the Court of Claims (Rec. 2, 9,) and its value fixed after full judicial hearing.

The United States is estopped by its own failure to appraise and to present to appellant on its own forms a written agreement to purchase from interposing such failure as a defense to applicant's claim. Likewise such failure can not fairly be urged as an argument against the existence of a contract to purchase the seized property. The United States can not take advantage of a failure to follow its own regulations, nor can it complain that appellant has provided and afterwards established at a judicial hearing an appraisement which the Court of Claims has found to be a fair value of the property.

Paraphrasing the language of this court in Campbell vs. U. S. 107 U. S. 407: It would be a curious thing to hold that Congress after clearly defining the right of appellant to receive compensation for its property taken and destroyed in the arrest and eradication of foot and mouth disease, had empowered the Secretary of Agriculture to make regulations as to the procedure of his own Department, which would operate to defeat totally the right which Congress granted—and especially when the Department has failed to follow those same regulations.

It is argued that "it was not contemplated or intended by the act or the regulations that agents of the Federal Government should have the power to go into the States, seize and destroy the prop-

erty of their citizens, which had not become the subject of interstate commerce, unless such agents should first acquire possession by purchase from the owners." (Appellant's Brief, 14.)

Properly interpreted this is undoubtedly a fair statement of the intent of Congress. But clearly a purchase may be express or implied. It may be evidenced by a writing or it may be created by parol. The owner may waive any requirement as to form or method of procedure. The exigencies of a situation such as existed in the Autumn of 1914, often made seizure and destruction of property necessary before an appraisal could be made and a written contract prepared and executed. If the argument of the appellee is sound, it was the duty of appellant by force if necessary to resist a taking of his property until the regulations had been complied with—a course to be condemned in an emergency which "in the opinion of the Secretary of Agriculture was so serious as to threaten the live-stock industry of the United States." (Rec. 6.) Appellant did what a good citizen ought to do. It waived the preliminaries, consented to the seizure of its property and its destruction, and now having done all it could to fix a value, it is confronted with the proposition that it cannot recover because it accommodated the United States for the benefit of the live-stock industry of the entire nation. The argument, we respectfully submit is untenable.

Campbell v. U. S., 107 U. S. 407.

U. S. v. Flanders, 112 U. S. 88.

U. S. v. Great Falls Manufacturing Co., 112 U. S. 645.

Salomon v. U. S., 19 Wall. 17.

U. S. v. Purcell Envelope Co., 249 U. S. 319.

Other cases cited in Appellant's Brief, pp. 16-36.

THE QUESTION OF VALUE.

It is argued that the property destroyed was of no commercial value at the time of its destruction, and hence recovery in any substantial amount must be refused. It is also argued that the value at the time of the seizure was not shown.

Our answer is that the evidence showed and the Court of Claims found the value of the property at the time of the seizure *as if it were not then exposed to or contaminated by the foot and mouth disease.* Any other basis of valuation would be futile. It would need no appropriation by Congress to purchase diseased or exposed animals or contaminated or exposed materials if they were to be valued as diseased, exposed or contaminated. Such animals and materials have no commercial value—but solely because of such disease, exposure or contamination. By the regulations, cattle were to be appraised at their dairy or meat value and swine at their meat value (Rec. 7). That is to say: They were appraised at their sound value and as if they had not been diseased or exposed. Appellant's hogs were so appraised (Rec. 9). It would be idle to appraise the materials

on any other theory. The Court of Claims specifically found that all the serum tested had been found good (Rec. 9). Further test was prevented by the United States. The Court found the value of uncontaminated serum to be one and one-half cents per cubic centimeter and the amount seized 1,602,575 cubic centimeters or $24,038.62. The Court also found the virus to be of the sound value of $417.60 and the serum blood of the sound value of $13,091. (Rec. 9.) These are the values that must control, if the Act of Congress is to be given a construction which will not make the provision as to the purchase of materials the mere idle provision which it would be if construed as now contended by the United States. It is unnecessary to argue that Congress could not have intended to appropriate money to pay for diseased animals at their meat value, as if not diseased, and to pay for contaminated materials at their value as such.

Appellant's hogs were paid for at their meat value, but the Court of Claims distinctly found that no compensation was paid *"for the serum blood in said hogs, as such."* (Rec. 9.) 465 of the hogs had been inoculated and their principal value was in their serum blood. This was a product entirely distinct and apart from (and far greater than) the meat value and in view of the finding, we submit that appellant is entitled to payment.

The judgment of the Court of Claims should be reversed and the case remanded with direc-

tions to enter a judgment in favor of appellant and against the United States for $37,547.22.

Respectfully submitted,

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